U.S. Supreme Court Asked to Review Dismissal of Racketeering Suit Filed Over Employer's Secret Agreement to Assist UAW Organizing: *Adcock v. Auto Workers* (U.S. S. Ct.)—Staff Attorney Bill Messenger.

Freightliner LLC, a Daimler-Chrysler subsidiary, operates several production facilities in North and South Carolina. In 2002, it entered into "neutrality and card-check" agreements with the United Auto Workers (UAW). Freightliner agreed to prohibit negative comments by management personnel about the UAW or union representation, compel employees to attend "captive audience" meetings with Freightliner and UAW officials on company time and property to be solicited to sign union authorization cards, grant UAW organizers sweeping access to Freightliner's facilities to solicit signatures, and recognize the UAW as bargaining representative without a secret-ballot election at any facility where a majority of workers signed union authorization cards.

Workers opposed to UAW representation at several Freightliner facilities asked Foundation attorneys for legal assistance after Freightliner and the UAW began implementing the neutrality and card-check agreements. While prosecuting unfair labor practice charges concerning the implementation of the neutrality and card-check agreements at Thomas Built Buses, a North Carolina subsidiary of Freightliner, Bill Messenger discovered secret side agreements in which, in return for the neutrality and card-check agreements, the UAW agreed to freeze represented employees' wages, increase their benefit costs, and make other concessions regarding severance pay, transfer rights, and overtime.

On January 24, 2006, Bill filed a cutting-edge suit against Freightliner and the UAW under the Racketeer Influenced and Corrupt Practice Act (RICO) for Ronnie Adcock and four other North Carolina Freightliner employees as representatives of a class of over 3000 employees at three Freightliner facilities covered by collective bargaining agreements with the UAW who have been damaged by the UAW's concessions. The complaint alleges that Freightliner's and UAW's conduct constituted a pattern of violations of § 302 of the Taft-Hartley Act, 29 U.S.C. § 186, which prohibits employers from giving any "thing of value" to a union seeking to represent its employees and prohibits unions from accepting such things. The complaint also alleges that the secret agreements are an illegal scheme for Freightliner to acquire and maintain control over a "company union" in which the UAW participated to obtain union dues from workers in the affected facilities.

Both Freightliner and the UAW moved to dismiss the case. On November 9, 2006, the court dismissed for failure to state a claim. In a terse opinion, the court simply stated that "[p]articipation of unions and employers in card check programs is proper and has never been held to be illegal." The court failed to consider whether the specific benefits Freightliner gave the UAW in this agreement are "things of value," and thus prohibited by § 302, nor whether the union's secret bargaining concessions damaged the employees.

Bill appealed for the workers to the U.S. Court of Appeals for the Fourth Circuit. After briefing was completed, and oral argument had been scheduled, the court postponed argument and ordered the NLRB to file an amicus brief stating its position on the issues the case presents.

On December 4, 2007, the NLRB filed its brief. It took no position as to whether the organizing assistance in question constitutes a "thing of value," noting that the courts, not the Board, have jurisdiction to enforce § 302. The NLRB also pointed out that conduct that is not an unfair labor practice could nonetheless violate § 302. Thus, on balance, the Board's brief helped the workers' case. Both sides then responded to that brief.

The court finally heard oral argument on October 28, 2008. The three judges on the panel asked almost no questions, thus giving no indication how they might rule. However, on December 23, 2008, the court affirmed dismissal of the case. The court acknowledged that the concessions that Freightliner gave the UAW "serve the interests of . . . the Union." Nonetheless, ignoring the rule that factual allegations of a complaint must be treated as true on a motion to dismiss, the court held, illogically, that those concessions were not even intangible "things of value," but merely "mutually acceptable ground rules" for the organizing campaign. A petition for rehearing en banc was subsequently denied.

On April 21, 2009, Bill filed a petition for certiorari asking the U.S. Supreme Court to hear the case. The petition argues that the case is exceptionally important because the Fourth Circuit has created a huge exemption from § 302's plain language that threatens the integrity of the organizing and collective-bargaining processes established by Congress. The petition also points out that the circuit court's narrow interpretation of the term "thing of value" conflicts with the broad interpretation given to that term by the Supreme Court and other circuits.

On May, 21, 2009, the National Federation of Independent Business Small Business Legal Center and Society for Human Resource Management filed a motion for leave to file and attached "friend of the court" brief in support of the workers' petition. This amicus brief notes that the case raises issues of great importance to the business community. It contends that the Fourth Circuit's narrow reading of § 302 will "improperly encourage unions to extort valuable organizing assistance from employers" through "corporate campaigns."

Freightliner and the UAW filed their opposition to the petition for certiorari on July 13, 2009. The case is scheduled for conference by the Justices on September 29, 2009, after which the Court will announce whether it will hear the case or not.